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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

315 U.S. 811

No. 870

SAMUEL BERNSTEIN,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Petitioner and Appellant below,

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UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Samuel Bernstein respectfully shows:

I

Summary Statement of the Matter Involved.

Petitioner was convicted by a jury after a trial in the United States District Court for the Eastern District of New York upon an indictment (R. 8) charging him and four other defendants in two counts with (1) knowingly concealing and facilitating the concealment of three grains of morphine knowing that it was imported contrary to law, and (2) with knowingly concealing, transporting and facilitating the concealment and transportation of thirty-nine ounces of morphine knowing the same to have been so transported.

Petitioner was sentenced to serve a term of ten years and to pay a fine of $500, the same sentence to run concurrently on both counts of the indictment (R. 786).

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon the ground that he had been denied a fair trial in that the Trial Court had permitted into evidence inadmissible and prejudicial proof of unrelated arrests and criminal charges and had confused the jury by misinterpreting the crime charged. The Circuit Court in an opinion by Judge A. N. Hand affirmed the conviction (R. 839).

The first question presented is:

Whether it is proper to put the character of a defendant in issue, in a criminal trial, through proof of arrests and criminal charges unrelated to the crime charged, and through instructions by the Trial Court to the jury that such proof should be considered by them, where the defendant did not testify or put his character in issue and where the crime charged did not involve proof of motive or intent.

At the trial, one Adelman, who had previously been convicted for possession of the narcotics in question, which had been found in his home, testified that about one month prior to his, Adelman's, arrest, petitioner had handled the narcotics. Two relatives of Adelman's testified to petitioner's presence in the Adelman home, but denied knowledge of the narcotics. Adelman further testified that it was not until approximately one year after his conviction that he had informed the authorities of petitioner's connection with the case.

There was no proof that the other defendants with whom petitioner was jointly indicted ever knew or saw him. No narcotics were produced in the court room, but a Government chemist testified that he had made tests prior to Adelman's trial and that the presence of narcotics was indicated on some of the utensils which were exhibits both in that trial and in the instant case.

The petitioner did not testify at the trial. Nevertheless, two Government agents were permitted to testify concerning petitioner's arrest in another and unrelated case in another jurisdiction in March, 1940, fourteen months after the alleged commission of the instant crime, as follows (R. 718) (Agent Olivera testifying):

> "Q. Give us the address? A. 31 West 85th Street. We told Mr. Bernstein—I introduced Mr. Rogers, a narcotic agent, and stated to Mr. Bernstein that we were Federal narcotic agents. He asked us if he could get dressed. We told him that he could. We placed him under arrest on the indictment. I asked the defendant if he would give us permission to search the premises. I called his attention to the fact that he had a constitutional right to refuse such permission; that we had the right to search on the basis of a warrant that we had for his apprehension. He had no objection to the search. We searched the premises. As we went in there on the right-hand side there was a couch. At the foot of that couch there was a small closet and from the closet we removed articles consisting of two of the last exhibits, 24 and 25 for identification."

It should be noted that the indictment in the instant case was not filed until June 4, 1940 (R. 7), several months after the arrest testified to above; the indictment referred to by Agent Olivera being another case.

And further concerning the same incident (R. 724):

> "Q. What question did you direct to Samuel Bernstein relative to this exhibit? A. I asked the defendant, Sam Bernstein, if this exhibit was one of the exhibits that belonged to his son. The defendant, Sam Bernstein, did not answer, remained silent. I further asked the defendant in relation to this exhibit if this was a sample of the opium he had given to Adelman."

Agent J. J. Rogers was also allowed to testify over objection and exception to the circumstances of the arrest

in March, 1940. There was no basis for the introduction of this testimony except to prejudice the jury. It concededly had no connection with the instant case.

Motions for a mistrial, a severance and to strike were all denied upon the ground that no authorities or precedents for such rulings were submitted to the Court (R. 745).

Adelman testified (R. 248):

> "Q. You had met Mr. Collins some time about ten or eleven years before? A. That is correct.
> Q. Connected with his official duties? A. That is correct.
> Q. As Customs Inspector. A. That is correct.
> Q. That was before you went to Brussels? A. That is correct.
> Q. Did your meeting with Collins have anything to do with narcotics? A. No, sir.
> Q. Nor with the place of your birth? A. No.
> Q. Nor with the arrest of any person other than yourself? A. He took me down as a witness against Sam Bernstein."

Counsel promptly moved for the withdrawal of a juror and for a mistrial. This motion was denied (R. 248).

Adelman testified further (R. 249):

> "Q. I ask you in plain words: you have just stated that you were taken as a witness; is that statement correct, yes or no? A. At the time he talked to me I was not a witness. He put me under bonds for a witness against him."

Counsel again moved for the withdrawal of a juror, for a mistrial and for a severance. This motion was denied with an exception (R. 249).

Despite objection, Narcotic Agent White related an incident in which he had a conversation with the defendant Lorber on February 24, 1939, six weeks after the arrest of Adelman, and not in the presence of the defendant Bernstein (R. 53):

> "Q. Please give us the conversation? A. Lorber asked me if I was looking for a man named Sammy, who had a very prominent disfiguration on his face. I said I was. I told him I believed Sammy was * * *."

It should be noted that the defendant Bernstein was referred to as Sam throughout the trial. There was no showing that this had any connection with the instant case.

It is unquestioned that none of the foregoing testimony had any connection with the crime charged in the indictment.

Not only did the Trial Court permit the prosecution to put petitioner's character in issue through this type of evidence, but in its instructions to the jury it directed the jurors' attention to the fact that this was a proper issue to be considered by them when it stated (R. 747):

> "Your task will consist almost exclusively in deciding who is telling the truth and in order to aid you in that process it seemed necessary to permit a very considerable latitude in inquiry into the activities and the conduct and manner of living, et cetera, of the chief characters in the case."

By its decision the Circuit Court disagreed with decisions of the Supreme Court of the United States and with decisions of other circuits when in its opinion it stated in substance that there was no merit to objection to the introduction of this prejudicial type of proof (R. 843). It overlooked the fact that intent or motive was not involved and that this evidence was inadmissible for any purpose. When the opinion stated that the Trial Court would have acted if requested, it disregarded the record of the proceedings which shows the Trial Court's refusal to strike or to sustain other objections to this evidence (R. 248, 249, 745).

The second question presented is:

Whether or not the Trial Court in its charge misinterpreted the statutes upon which the indictment is based

(Title 21, U. S. C., Sec. 174; Title 18, U. S. C., Sec. 550) and so denied petitioner a fair trial.

The rulings of the Court and its charge to the jury permitted the petitioner to be tried for crimes not charged in the indictment and so confused the issues involved that the petitioner was foreclosed from his right to a fair trial.

The petitioner was ostensibly on trial for possession of narcotics, yet the Court instructed the jury that the defendant was also accused of the crimes of illegal conspiracy, of manufacture and of sale of narcotics.

The simple issue of concealment or possession of illegally imported narcotics by the petitioner was not given to the jury to determine petitioner's guilt or innocence.

At R. 752 the Court stated as follows:

> "* * * The product as so treated, then had to get into circulation.
>
> Now the traffic in narcotics is like a legitimate enterprise. It is not sufficient that any articles in trade or commerce be manufactured. They must not only be manufactured but they must be sold. They must get into distribution; so you will see that the Government charges that these four defendants acting, some for one purpose and some for another, handled this acquisition of supplies, to fabricate a new substance and the distribution of the new substance, a completed thing. That is what the Government charges."

Further, at R. 753, after asking the jury to determine whether or not the witness Adelman could have accomplished the crime alone, the Court characterized the crime involved as a "well rounded enterprise", and then said:

> "* * * you then inquire as to whether these defendants or any one of them was shown by satisfactory and the required margin of proof to have been the persons as to one or all, who did co-operate or did aid and abet the accomplishment of that illegal and fairly well rounded enterprise."

After the main charge the defendant was compelled by necessity of the Court's interpretation to request the following (R. 827):

> "If the Jury does not find from the evidence that all of the defendants acted jointly as a single group they must acquit."

The Court refused to so charge and exception was taken (R. 769).

It is obvious that the Trial Court charged in this manner merely to bolster its previous erroneous rulings during the trial, when it had admitted evidence relating to the other defendants, showing their participation in many immoral and criminal activities unconnected with the petitioner (R. 268, 510, 182, 190, 326).

In a vast number of instances evidence was offered against and confined to isolated defendants (R. 48, 50, 51, 57, 60-65, 73, 77, 80, 81, 93, 96, 98, 100, 103, 105, 106, 108, 109, 112, 114, 115, 122, 123, 129, 135, 137, 144, 145, 147, 149, 151, 156, 158, 159, 160, 161, 163, 185, 186, 189, 318, 344, 370, 372, 380, 381, 382, 387, 388, 392, 399, 401, 404, 503, 694, 717, 720). Much of this did not in any way concern petitioner, but dealt with the criminal activities and associations of the other defendants with notorious criminals.

In each instance the Court instructed the jury that the testimony was to be considered only as to the defendant against whom it was offered; this instruction completely overlooked the human equation. It is not possible that any jury could have obeyed these instructions.

II

Reasons Relied On for Allowance of the Writ.

1

The decision of the Circuit Court of Appeals for the Second Circuit is in direct conflict with the applicable law established by the Supreme Court of the United States and by the various Circuit Courts which holds that the

character of a defendant is not to be put in issue in a criminal case through proof of unrelated arrests and criminal charges unless the defendant himself does so. This case does not involve proof of intent or motive. Therefore it does not fall within the sole exception to the settled law.

2

The charge of the Trial Court improperly interpreted a Federal statute (Title 21, U. S. C., Sec. 174) in that it instructed the jury that it included the crimes of illegal sale, manufacture and conspiracy to sell and manufacture narcotics. The charge and rulings on evidence utterly confused the issues. Petitioner was thereby denied a fair trial upon the indictment.

Petitioner believes that this decision seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Circuit Court, had in the case numbered and entitled on its Docket Calendar No. 63, *"United States of America, Appellee* v. *Samuel Bernstein, Appellant,"* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated, January 8, 1942.

SAMUEL BERNSTEIN,
By HERBERT ZELENKO,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No.

SAMUEL BERNSTEIN,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below.

There was no opinion rendered by the Trial Court relating to the within petitioner. The opinion of the Circuit Court below (R. 839), rendered on December, 1941, is still unreported.

II

Jurisdiction.

A

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on December 17, 1941 (R. 844).

B

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Sec. 347, subd. a (Judicial Code, Sec. 240-a as amended), and Rule 38 of the revised rules (1939) of the Supreme Court of the United States.

C

The reasons stated in the preceding petition under II (pp. 7-8), herewith adopted and made part of this brief and believed to constitute good grounds for invoking jurisdiction of this Court.

III

Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-7), which is hereby adopted and made a part of this brief.

IV

Specification of Errors.

A

The Circuit Court erred in holding that the Trial Court correctly permitted proof against the petitioner of criminal arrests and charges against the petitioner wholly unrelated to the crime charged in the indictment (Assignments of error No. 4 [R. 815] and No. 21 [R. 827]).

B

The charge and rulings on evidence by the Trial Court were so confusing that the petitioner was denied a fair trial upon the indictment (Assignments of error No. 14 [R. 821] and No. 20 [R. 825]).

Statutes Involved.

Title 21, U. S. C., Sec. 174:

> "If any person fraudulently or knowingly imports or brings in narcotic drugs into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than Five Thousand Dollars and imprisoned for not more than ten years. Whenever on trial for violation of this Section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury."

Title 18, U. S. C., Sec. 550:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."

ARGUMENT

A

The Circuit Court erred in deciding that the action of the Trial Court in permitting proof of unrelated arrests and criminal charges against petitioner, thereby putting his character in issue, did not constitute reversible error.

The crime charged did not involve proof of motive or intent. The petitioner did not testify. The decision of the Circuit Court, holding that proof of unrelated arrests

and criminal charges against the petitioner was proper, is in direct conflict with applicable law.

Boyd v. *United States,* 142 U. S. 450, 458 (1891).
Greer v. *United States,* 245 U. S. 559, 560 (1917).
Brown v. *United States,* 83 Fed. (2) 383 (C. C. A. 3, 1936).
Tedesco v. *United States,* 118 Fed. (2) 737 (C. C. A. 9, 1941).
Tinsley v. *United States,* 43 Fed. (2) 890 (C. C. A. 8, 1930).
Eley v. *United States,* 117 Fed. (2) 526 (C. C. A. 6, 1941).
Hilliard v. *United States,* 121 Fed. (2) 992 (C. C. A. 8, 1941).
Mackreth v. *United States,* 103 Fed. (2) 495 (C. C. A. 5, 1939).

B

The rulings on evidence and the charge of the Trial Court which misinterpreted the indictment and the statute upon which it was based were so confusing that petitioner was denied a fair trial.

The Court charged (R. 752):

> " * * * The product as so treated, then had to get into circulation.
>
> Now the traffic in narcotics is like a legitimate enterprise. It is not sufficient that any articles in trade or commerce be manufactured. They must not only be manufactured but they must be sold. They must get into distribution; so you will see that the Government charges that these four defendants acting, some for one purpose and some for another, handled this acquisition of supplies, to fabricate a new substance and the distribution of the new substance, a completed thing. That is what the Government charges."

This definition and interpretation of the indictment was erroneous, confusing and prejudicial. Under these instructions the Court in effect stated that the crime charged was not only concealment or possession, but conspiracy, illegal manufacture and illegal sale of narcotics.

The jury was thus permitted to find that even if the defendant aided and abetted in the illegal manufacture of narcotics, in an illegal sale, without possession or concealing any drugs, or that he conspired to commit these crimes, he could be found guilty.

The Court had instructed the jury that the crime involved was one "well rounded enterprise" (R. 753), yet it refused to give instructions appropriate to base the guilt or innocence of the defendants on whether or not it was one enterprise (R. 827).

It was inevitable therefore that the jury was confused and could not clearly decide the issue of fact on the law as presented by the Court. This was highly prejudicial to the defendant.

The Court had admitted into evidence acts of the other defendants and of other persons, which acts were done without the knowledge or consent of the petitioner. Evidence of these acts would be admissible if a conspiracy were proved in fact although not charged in the indictment. The jury could only find a conspiracy in fact if it found that all the defendants acted jointly. If it found that there was no conspiracy in fact the acts of the other defendants were inadmissible against the petitioner Bernstein.

The Court's position was that of allowing the jury to consider all of the acts of all of the defendants against petitioner even though these acts were unconnected with him. It allowed an attempt by the prosecution to prove a conspiracy in fact, yet in substance it instructed the jury that even if these defendants were unconnected in their criminal activities, or were not acting jointly, it could nevertheless consider all of their acts against every other defendant.

Though concededly the circumstances in the instant case were suspicious, there was no requisite proof of illegal sale or illegal manufacture.

Hence, even the Court's reference to these crimes in its charge was highly prejudicial. The portions of the charge above quoted were a series of vague and uncertain interpretations of other crimes without adequate proof.

While proving the crime charged in the indictment it might have been proper to prove incidental crimes. However, the Court in its charge tacitly admitted that proof of the crime charged in the indictment was incidental to other possible crimes not actually charged. This could only serve to base a conviction upon factors not in issue.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

HERBERT ZELENKO,
Counsel for Petitioner.

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Remus v. *United States*, 291 Fed. 513, certiorari denied, 263 U. S. 717 — 9

Suhay v. *United States*, 95 F. (2d) 890, certiorari denied, 304 U. S. 580 — 7

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Statute:

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442569—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 870

SAMUEL BERNSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 839–844) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 17, 1941 (R. 844). The petition for a writ of certiorari was filed January 16, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was error in admitting material evidence which may have suggested that petitioner had previously been charged with other offenses or arrested therefor.

2. Whether the trial court's rulings on the admission of evidence and its charge to the jury resulted in trying petitioner for offenses not charged in the indictment.

STATUTE INVOLVED

21 U. S. C. 174 provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains

the possession to the satisfaction of the jury.

STATEMENT

Petitioner and four others were indicted on June 4, 1940 (R. 3), in the Eastern District of New York on two counts charging violations of 21 U. S. C. 174 (R. 8–9). The first count alleged that they concealed and facilitated the concealment of three grains of morphine, knowing that it had been imported contrary to law, and the second charged that they concealed and transported and facilitated the concealment and transportation of 39 ounces of morphine, knowing that it had been so imported.

Motions for severances and separate trials on behalf of the defendants Cohen, Lorber, and Angelson were denied (R. 10–12, 16–17, 30). Upon the motion of the Government, the court granted a severance as to the defendant Weiss (R. 31). Petitioner made no equivalent motion before trial (R. 840), but on four occasions during trial moved for a mistrial and severance (R. 57, 96, 268, 738).

The defendants were convicted upon both counts of the indictment (R. 5, 770). Petitioner was sentenced to ten years' imprisonment and to pay a fine of $500 on each count, the sentences of imprisonment to run concurrently (R. 6, 786). The convictions were affirmed by the Circuit Court of Appeals (R. 839–844).

As more fully appears at page 8, *infra,* the evidence showed that at petitioner's instance (R. 94–95), one Louis Adelman,[1] through defendant Lorber, procured quantities of morphine from defendant Cohen (R. 102–108, 115–118), which were given by Adelman or Schildwach to petitioner (R. 107–109, 117–118, 127–128). Petitioner "duplicated" the morphine, that is, made two ounces out of one (R. 109–111, 127–135), and delivered the completed product to other defendants (R. 111, 137, 142–143). Some of his equipment was purchased with funds advanced by Cohen (R. 121–122). Particles of morphine were found adhering to the utensils used by petitioner (R. 38–46, 129–135, 330–333), which were seized by federal narcotics agents in Adelman's apartment (R. 38–42, 164, 329, 364).

ARGUMENT

I

Petitioner argues (Pet. 2–5, 11–12) that certain testimony of Adelman and the narcotics agents concerned prior unrelated criminal charges against him or arrests therefor and thus served to put his character in issue. He contends that this was improper because he did not testify or place his character in question and also because

[1] Adelman and one Schildwach were convicted under a prior indictment. See *United States* v. *Adelman*, 107 F. (2d) 497 (C. C. A. 2).

the crime for which he was on trial did not involve intent or motive.

It is at once apparent, however, that such of this testimony as was received was properly admitted. Petitioner objects (Pet. 4) to the statement made by Adelman, a Government witness (R. 91), to the effect that he had been held as a witness against petitioner many years before (R. 248). This statement, however, was made on cross-examination in response to a question by counsel for two of petitioner's co-defendants (see R. 13, 31, 233). Petitioner's counsel immediately moved for a mistrial and when this was denied he requested the court to instruct the jury concerning the statement. The court accordingly instructed the jury that the statement had no bearing upon the issues before it and should not be considered in its deliberations. (R. 248–249, 843.) At the time counsel for the co-defendants was attempting to impeach the credibility of the witness (see R. 239–251). Especially in view of the court's specific instruction to the jury, it is obvious that no prejudice to petitioner resulted from this incident.[2]

[2] Petitioner also refers (Pet. 2) to the testimony of Adelman that petitioner handled the narcotics which were the subjects of the two counts of the indictment (R. 107–109, 111, 116–117, 127–128, 135, 140) and to the testimony of Adelman's wife and sister-in-law that petitioner had been to their homes with Adelman (R. 343–344, 359–362). This evidence was clearly admissible and we do not understand petitioner to contend that it was not.

Petitioner also objects (Pet. 3–4) to testimony of narcotic agents Olivera and Rogers which disclosed that he was arrested in March 1940, prior to the return of the indictment in the instant case, on what petitioner asserts was an unrelated charge (R. 718, 739). As is apparent from the extract from agent Olivera's testimony quoted in the petition (p. 3), the reference to the arrest was made merely in explaining the circumstances which led up to petitioner's consent to the search of his premises by the agents. While the articles taken from petitioner's premises as a result of this search were not admitted because the Government was unable to prove which of them were owned by petitioner and which belonged to his son (R. 721–723, 734, 790), petitioner did admit to the agents that "most" of the articles were his (R. 719, 721). Clearly, testimony as to this admission was admissible, since it tended to show that petitioner had in his possession apparatus which was apparently suitable for utilization in the morphine duplicating process. Hence, the testimony concerning the circumstances under which the admission was made was also admissible.[3]

---

[3] Germane evidence is, of course, not rendered inadmissible simply because it may also indicate the commission of other crimes. *Moore* v. *United States*, 150 U. S. 57, 61; *Devoe* v. *United States*, 103 F. (2d) 584, 588 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States*, 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Dysart* v. *United States*, 270 Fed. 77, 79–80 (C. C. A. 5), certiorari denied, 256 U. S. 694.

It is difficult to discern upon what ground petitioner objects (Pet. 4–5) to agent White's testimony that he told defendant Lorber that he was looking for a man named "Sammy" (R. 53). White's testimony regarding his conversation with Lorber was received only as against the latter (R. 48, 50); and White in no way connected his search with any crime other than that for which petitioner was on trial (see R. 37–40, 46–53). When White indicated that he was going to recount the details of this conversation with Lorber he was immediately cut off by the prosecutor before anything damaging to petitioner was said (R. 53).

II

Petitioner asserts (Pet. 5–7, 12–14) that the trial court's rulings admitting certain items of evidence as against other individual defendants and the court's instructions to the jury confused the issues and that the jury was led, particularly by the instructions, to believe that petitioner was charged not only with concealment and transportation of narcotics, but with conspiracy, manufacture, and sale as well. Examination of the alleged errors, however, shows that the trial court's rulings and charge were correct and that they in fact actually favored petitioner.

As the court below pointed out (R. 841), the evidence clearly revealed the existence of a joint enterprise or conspiracy among the defendants,

although such was not charged in the indictment. Petitioner informed Adelman that he had a process whereby he could "duplicate" a given amount of morphine, that is, make two ounces out of one, if he could be put in contact with somebody who would finance the operation (R. 94–95). Adelman approached defendant Lorber (R. 95–96, 99), who was instrumental in getting defendant Cohen to give an ounce of morphine to Adelman (R. 102, 106–108). The latter, in turn, gave it to Schildwach (R. 108), who delivered it to petitioner (R. 109). Petitioner made this into two ounces and gave it to Adelman (R. 109–111). Subsequently Cohen gave Adelman seventeen ounces of morphine in Lorber's presence and Adelman gave this to petitioner (R. 115–117). Cohen also gave twenty-two additional ounces to Adelman (R. 117–118) and advanced $40 to buy equipment for petitioner (R. 121–122). Defendant Angelson's car was used to transport this equipment to Adelman's apartment, where petitioner performed the duplicating process (R. 123–135). It was agreed that Cohen and one Weiss were to receive fifty percent of the profits, petitioner twenty-five percent, and Adelman, Schildwach, Lorber, and Angelson six and one-quarter percent each (R. 155–156).

It is settled, of course, that if a conspiracy is shown, the acts and declarations of one defendant, outside the presence of his co-defendants but in course of the conspiracy, are admissible against

the latter even though a conspiracy is not charged in the indictment. *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *Quercia* v. *United States,* 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States,* 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 298 U. S. 762; *Zarate* v. *United States,* 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867. Therefore, the items of evidence complained of (Pet. 7) could have been admitted against petitioner as well as against the defendants to whom they specifically related.[4] Petitioner was, consequently, favored in view of the admission of the evidence only as against other defendants.

Nor is there any merit in petitioner's argument (Pet. 6, 13) that the trial court's charge to the

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[4] Moreover, even if no conspiracy were proved, the evidence in question was admissible against petitioner by virtue of the statute making accessories responsible as principals (18 U. S. C. 550), to show that petitioner aided and abetted the commission of the crimes charged in the indictment. Under this statute an accessory may be charged directly with the commission of the crime and such an indictment is supported by evidence that he aided in its commission. *Jin Fuey Moy* v. *United States,* 254 U. S. 189, 192; *Backun* v. *United States,* 112 F. (2d) 635, 636–637 (C. C. A. 4); *United States* v. *Hodorowicz,* 105 F. (2d) 218, 220 (C. C. A. 7), certiorari denied, 308 U. S. 584; *Greenberg* v. *United States,* 297 Fed. 45, 48 (C. C. A. 8); *Remus* v. *United States,* 291 Fed. 513, 518 (C. C. A. 6), certiorari denied, 263 U. S. 717; *Harris* v. *United States,* 273 Fed. 785, 790 (C. C. A. 2), certiorari denied, 257 U. S. 646.

jury permitted petitioner to be tried not only for concealment and transportation, but for conspiracy, manufacture, and sale of narcotics as well. Petitioner did not except to the charge (R. 763); and a full reading of it shows that the two excerpts of which petitioner complains (Pet. 6) were proper discussion of the background of the crimes charged in the indictment. The court in these excerpts was simply summarizing the *modus operandi* of the defendants. At the outset of its instructions the court advised the jury in precise terms of the particular charges for which the defendants were on trial (R. 747–748). The court also specifically instructed the jury that "The conduct of other people is not before you. The possible commission of crime by other persons is not before you, and the possibility of the commission of a crime by any of these defendants, not charged in this indictment, is not before you. Your inquiry is centered and directed solely to the charges that I have already outlined * * *." (R. 757–758).[5]

CONCLUSION

The case was correctly decided below, there is no conflict of decisions, and no important question of law is involved. We therefore respectfully

[5] See also petitioner's requested instructions Nos. 18, 19, and 22 which were granted (R. 768–769).

submit that the petition for a writ of certiorari should be denied.

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